

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained in the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant testified in person before the ALJ in the first preliminary hearing held on January 4, 2002. Also testifying in person at that preliminary hearing were the following respondent's representatives: (1) David S. Kielhorn, service manager, (2) Tiffany Mytty, recruiter and the local center's human resource manager and, (3) Richard L. Barker, mechanic. At the April 25, 2002, preliminary hearing, Dustin Thompson, service advisor for the respondent testified before the ALJ.

Claimant alleges he injured his right shoulder while working for the respondent on Sunday, July 29, 2001. On that date, claimant was working as a service advisor running the service desk and scheduling work for mechanics. Claimant testified he injured his right shoulder while working on a truck after his scheduled shift ended at 5:00 p.m. The injury occurred when claimant was working by himself and all other employees had left the truck center.

Claimant returned to work on Monday, July 30, 2001, with soreness in his right arm and shoulder. Because of that soreness, claimant testified that he told Dustin Thompson, the service advisor running the service desk and supervising the mechanics, that he injured his right shoulder and arm the night before while repairing a truck. Claimant also testified that he discussed his injury on Monday, July 30, 2001, with two other employees, Richard Barker and an employee that he only remembers as Heath.

Claimant did not return to work after July 30, 2001. He sought treatment on his own on August 13, 2001 through Dr. Edward Cusick. Claimant provided Dr. Cusick with a history of injuring his right shoulder at work three weeks before August 13, 2001. Dr. Cusick determined claimant had a right rotator cuff strain. He took claimant off work, provided claimant with hot pack and ultrasound therapy, and prescribed an anti-inflammatory medication.

Because claimant had not returned to work and had not contacted respondent, respondent's service manager, David S. Kielhorn, contacted claimant to ask why he was absent. On August 15, 2001, claimant met with Mr. Kielhorn and Tiffany Mytty. At that time, claimant presented respondent with an off work slip from Dr. Cusick. Claimant testified that he told both Mr. Kielhorn and Ms. Mytty that he did not want to make a workers compensation claim because he thought he would only be off for a short period of time. Instead, claimant testified he told both Mr. Kielhorn and Ms. Mytty that he had pulled a muscle at work but wanted to make a claim for short-term disability instead of a claim for workers compensation benefits.

Both Mr. Kielhorn and Ms. Mytty, however, testified that Mr. Keilhorn asked claimant if he had hurt his shoulder at work and he denied a work injury. In fact, Ms. Mytty testified that she then suggested that claimant make a short-term disability claim because he was off work as a result of a non-work-related injury.

Richard Barker, one of respondent's mechanics, was present when claimant worked the day after his alleged injury on July 30, 2001. He testified that claimant told him that he had hurt his shoulder at home and not at work.

Dustin Thompson, the service desk supervisor, who was on duty on July 30, 2001, testified at the April 25, 2002, preliminary hearing. As the service desk supervisor, Mr. Thompson or the service manager were the respondent's representatives that employees were to report work-related accidents. Mr. Thompson was asked, "Do you recall Mr. Brooks [claimant] telling you that he injured his shoulder or pulling a muscle shoving the rear end?" Mr. Thompson answered, "No."¹

The injured worker is required to give the employer notice of accident, within 10 days after the date of a work-related accident, or establish just cause for not giving the employer the 10-day notice within 75 days.² Here, the claimant contends that he proved through his testimony he gave respondent timely notice of his July 29, 2002, accident by notifying certain of respondent's management employees of the accident within the required 10 days.

But all of the respondent's representatives, whom claimant alleged he notified that he hurt his right shoulder at work, disputed claimant's testimony. The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed their testimony over the testimony of claimant. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. Therefore, the Board concludes, for preliminary hearing purposes, that claimant failed to give respondent timely notice of his July 29, 2001, accident.

¹ P.H. transcript, April 25, 2002, p. 9.

² See K.S.A. 44-520.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that ALJ Jon L. Frobish's April 26, 2002, preliminary hearing Order should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2002.

BOARD MEMBER

c: Paul V. Dugan, Attorney for Claimant
Kurt W. Ratzlaff, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation